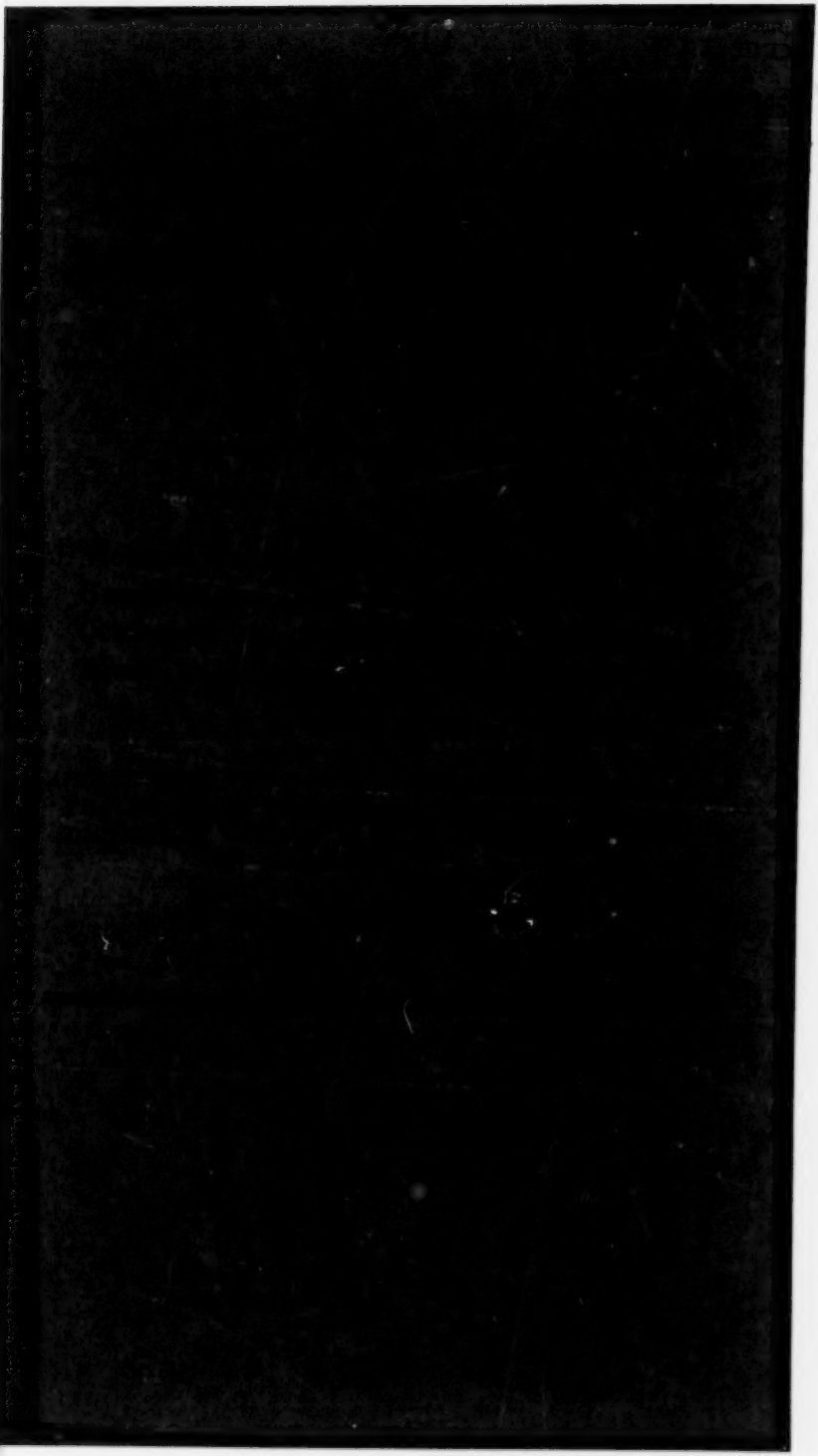


IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA DIVISION ONE

OCTOBER TERM, 1951

2nd Civil No. 17913

IN THE MATTER OF THE ESTATE OF CHRISTIAN F. REIHS, DECEASED,

HERMAN WEINMANN, PETITIONER AND APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO ALIEN PROPERTY CUSTODIAN, OBJECTOR AND RESPONDENT,

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A CORPORATION, EXECUTOR

ON APPEAL TO THE UNITED STATES SUPREME COURT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee J. Howard McGrath, the Attorney General of the United States, moves that the appeal be dismissed or that the judgment of the District

Court of Appeal of the State of California be affirmed.

This is a direct appeal from the final judgment of the District Court of Appeal (Second Appellate District, Division One), of the State of California, entered on February 13, 1951. This judgment became final on April 13, 1951, when the Supreme Court of California denied appellant's petition for a hearing. Appeal was allowed by the Presiding Justice of the District Court of Appeal on June 21, 1951, and appeal papers were served on the United States Attorney for the Southern District of California on June 25, 1951.

I

In 1948, appellant petitioned the Superior Court of the State of California in and for the County of Los Angeles to determine interests in the estate of Christian F. Reihs. Appellee[1] appeared in these proceedings as the successor to three German nationals whose interests in the estate he had vested pursuant to the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. §§ 1, *et seq.*)[2]

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[1] Appellee succeeded to the powers and duties of the Alien Property Custodian on October 14, 1946, Executive Order 9788, 11 F. R. 981.

[2] Appellee also appears (pursuant to authority vested in him by Section 5 of Executive Order 9095, 7 F. R. 1971, as amended) on behalf of certain German charitable institutions that have interests in this estate as legatees. For reasons of policy appellee has not vested these interests.

Christian F. Reihs, an American citizen, died testate on November 24, 1946, in Los Angeles County, his residence. His estate consisted entirely of personal property in California. His will (which was duly admitted to probate) provided for several bequests, among them a minor one to appellant, a naturalized American citizen who is the testator's half-cousin and his closest kin residing in the United States. Bequests were also made to two nephews and another relative of the decedent, all of whom reside in Schorndorf, Germany, a town within the United States Zone of Occupation; having determined that these legatees were enemy nationals, the appellee has vested their interests in the estate.

In his petition to the Superior Court, appellant alleged that on November 24, 1946 (when the testator died) American citizens had no right to take property from German estates. He therefore contended that certain German charitable institutions named as legatees in the will and the three legatees whose interests the Custodian had vested were ineligible to take by virtue of Section 259 of the Probate Code of California (Cal. Stat. 1945, c. 1160, p. 2208). That statute conditions the right of a non-resident alien to inherit in California upon the existence of a reciprocal right of an American citizen to inherit in the country of which the alien is a national. Accordingly, as the testator's next of kin in the United States, appellant claimed all

property bequeathed to the German legatees. Appellee denied the asserted absence, under the law governing the American zone of occupation in Germany, of rights in American citizens to inherit the estates of Germans residing in American-occupied Germany, and sought distribution to himself of the legacies covered by his vesting order.

The California statute (Sec. 259 of the Probate Code) placed on appellant the burden of showing that on November 24, 1946 (when the decedent died) the laws of American-occupied Germany failed to afford to American citizens reciprocal rights of inheritance. To sustain that burden, appellant introduced expert testimony and certain international agreements and proclamations dealing with the problems created by the collapse of the Nazi regime. He also introduced numerous enactments of both the Allied military government for Germany and the American military government for the United States zone of occupation. Appellee, in turn, offered both expert testimony and documentary evidence tending to show that on the day of testator's death American citizens enjoyed full inheritance rights in American-occupied Germany. The trial court filed Findings of Fact, Conclusions of Law (Statement as to Jurisdiction, App. A), and a Memorandum of Opinion. It held that appellant had failed to sustain his burden of proving that the laws of Germany, in effect on

November 24, 1946, denied reciprocal inheritance rights to American citizens. It found that on that date American citizens could inherit from German estates on the same basis as German citizens. Accordingly, it determined that the requirements of Section 259 of the California Probate Code were fulfilled, and that the German charitable institutions and appellee, as successor in interest to the three German individual legatees, were entitled to distribution. A final decree to that effect was entered on January 16, 1950. (Jurisdictional Statement, App. A.) The District Court of Appeal affirmed the decree and filed an opinion. (Jurisdictional Statement, App. A.) It later denied appellant's petition for rehearing. On April 12, 1951, the Supreme Court of California denied appellant's petition for a hearing; this appeal followed.

II

It is the law of California that the existence or non-existence of reciprocal inheritance rights of American citizens of any foreign country, within the meaning of Section 259 of the Probate Code, presents an issue of fact when, as here, the expert evidence concerning the existence, interpretation, and effect of the foreign country's laws is in sharp conflict. *Estate of Schluttig,* 36 A. C. 367, 375, 224 P. 2d 700; see also *Estate of Miller,* 104 A.C.A. 1 (Dist. Ct. of App. 1st Dist., May 1, 1951). That

factual issue was resolved by the trial court against the appellant; under the established rule, the District Court of Appeal affirmed the trial court's decision since its finding was deemed to be sustained by "amply sufficient evidence." If the foreign country involved had been Great Britain or France, there would be no doubt that this factual finding as to the foreign law would not, and could not, be reviewed by this Court (absent some reliance on a treaty between the United States and the other nation). For no federal question would be presented.

In an effort to overcome this obstacle to review by this Court, appellant claims that, as here applied, the California inheritance statutes contravene the Federal Constitution and federal "law." As we understand it, his argument seems to be that (a) the law of occupied Germany purports to govern both the right of Germans in occupied Germany to inherit from California testators as well as the right of Americans in California to inherit from German testators; (b) under this occupation law, properly construed, Germans are prohibited from inheriting property in California and Americans are likewise forbidden to inherit property in occupied Germany; (c) this occupation law is "federal law," paramount to any provisions California may make on these subjects, and therefore supersedes any inconsistent California statute; and (d) the proper interpretation of the

occupation law on these subjects presents federal questions for determination by this Court.[3]

There appear to be severe jurisdictional difficulties in this position.[4] But we do not stop to deal with them in detail because it is plain that the fundamental substantive contention on which appellant must base his entire claim—that the law of occupied Germany either prevents Germans from inheriting California property or forbids Americans from inheriting Germany property, or both—is entirely groundless. It is clear both that Germans may inherit from Americans and that

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[3] In short, appellant's argument seems to be either that (i) Section 259 of the California Probate Code prevents the German legatees from inheriting because, on the correct interpretation of German inheritance law, the reciprocity requirements of Section 259 cannot be fulfilled, or (ii) regardless of Section 259, and even if there be reciprocity, the German legatees cannot inherit because German law prevents their inheriting property in the United States, and this German law supersedes the general inheritance provisions of California law which would otherwise enable the German legatees to take (Sections 225 and 226 of the California Probate Code).

[4] For instance, [1] if appellant's argument is merely that as a matter of German occupation law Americans cannot inherit German property, and therefore that the California courts erred in holding reciprocity to exist, the case does not fall under 28 U.S.C. 1257(2), since the validity of Section 259 (or of other provisions of the California Probate Code) would not then be drawn into question, and review can be had here, if at all, only by writ of certiorari under 28 U.S.C. 1257(3); and [2] even if the California courts misread German occupation law to permit inheritance by Germans or by Americans, it is questionable whether such a misconstruction would raise an issue of federal law, cognizable under 28 U.S.C. 1257(2) or 1257(3), since it is German law which would be interpreted (cf., *Neely* v. *Henkel*, 180 U.S. 109, 119, 122; *In re Ross*, 140 U.S. 453, 464; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318).

Americans are permitted by the law of occupied Germany to inherit from Germans, and that being so, appellant's entire case falls as unsubstantial.

Appellant's position on the merits is squarely refuted by the evidences of German occupation law which were carefully considered by the California trial court and by the District Court of Appeal. It is undeniable that Americans are permitted by that law to inherit from Germans, and also that nothing in German law prevents Germans from inheriting property located abroad.

On the latter issue, appellant's position is also destroyed by *Clark* v. *Allen,* 331 U. S. 503, 514. In that case, the Court rejected appellee's contention that Section 259 is unconstitutional as an extension of State power into the field of foreign affairs. It also held that Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany of 1923, 44 Stat. 2132, which guarantees to German aliens the right to inherit real property in this country, survived the establishment of Allied control over Germany's foreign affairs and treaty obligations. The survival of this treaty demonstrates, in itself, that Germans in the American occupied zone were permitted, in 1946, to inherit American property. For if, as a matter of occupation policy, the military government had desired to suspend or impair the right of Germans to inherit property in the United States, it would have been absurdly inconsistent with that policy to main-

tain and enforce a treaty with the United States which expressly guarantees that right. Moreover, it is too plain for argument that the Allies assumed control over Germany's, and German nationals', "extraterritorial rights" not to disable Germans from inheriting in California, or anywhere else, but in order to insure that Germany's external assets represented by these rights could be vested by the several Allied governments and used for purposes of reparations. Thus, the very foundation of the international agreements and declarations dealing with German extraterritorial rights is the assumption that Germans continue to have property rights (including the right to inherit) in the various countries of the world. It is hardly surprising, therefore, that none of the Allied declarations and agreements relied upon by appellant as much as intimates that, *as a matter of occupation policy or of occupation law*,[5] German extraterritorial rights were suspended or impaired. Had they done so, they would have evidently defeated their own purpose. Finally, if appellant's contention were true, the scheme of the Trading With the Enemy Act would be completely undercut. It presupposes the continued existence in California, and in all other states, of German property rights,

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[5] Of course, the various Allied countries may have adopted domestic statutes (i.e., French, English, or American law) depriving Germans of the right to inherit property within those countries.

as the Court has explicitly recognized, *Clark* v. *Allen, supra,* 331 U. S. 510, 511.

For this reason—as stated above—we need not consider appellant's further contention that a policy of suspension or impairment of inheritance rights, pursued by the occupation authorities against the inhabitants of the occupied area, ousts, as a matter of federal constitutional law, California of its legislative authority to grant non-resident German enemy aliens property rights in California. Even where local law is displaced by what is clearly *federal* law (see footnote 4, *supra*), the Congressional or Executive intent to preempt the field must clearly appear. Cf. *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 154; *Hines* v. *Davidowitz,* 312 U. S. 52; *Hauenstein* v. *Lynham,* 100 U. S. 483. This is, *a fortiori,* true of international agreements which purport to deal only with the problems created by the military occupation of a foreign country and to provide for the internal governing law of the occupied territory.

Similarly, appellant can derive no comfort from his argument that the Allied agreements and declarations for the control of defeated Germany are political acts, not subject to judicial review, which deprived the courts below of their power to adjudicate the rights of German enemy aliens with respect to estates in California. The argument misconceives the meaning of the doctrine that political

acts are not subject to judicial review. It is true, of course, that the executive assumption and exercise of control over Germany is a political act not susceptible of judicial review. Cf. *United States* v. *Curtiss-Wright Export Corporation,* 299 U. S. 304, 320; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111; *Hirota* v. *MacArthur,* 338 U. S. 197; *Johnson* v. *Eisentrager,* 339 U. S. 763; *Flick* v. *Johnson,* 174 F. 2d 983 (C.A.D.C.), certiorari denied, 338 U. S. 879. This does not mean, however, that in adjudicating private rights the courts are precluded from determining the effect of, or interpreting, a political act which is accepted as valid by everybody. Cf. *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 138; *Banco de España* v. *Federal Reserve Bank,* 114 F. 2d 438, 442 (C.A. 2). Here, neither appellant nor appellee question the validity of the Allied agreements and declarations. The parties are merely at issue concerning the impact of these documents on the rights of German enemy aliens to inherit in California. That issue was properly resolved against the appellant on the basis of "amply sufficient evidence."

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the appeal

be dismissed or that the judgment of the District Court of Appeal of the State of California be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1951

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 205

HERMANN WEINMANN,

Appellant,

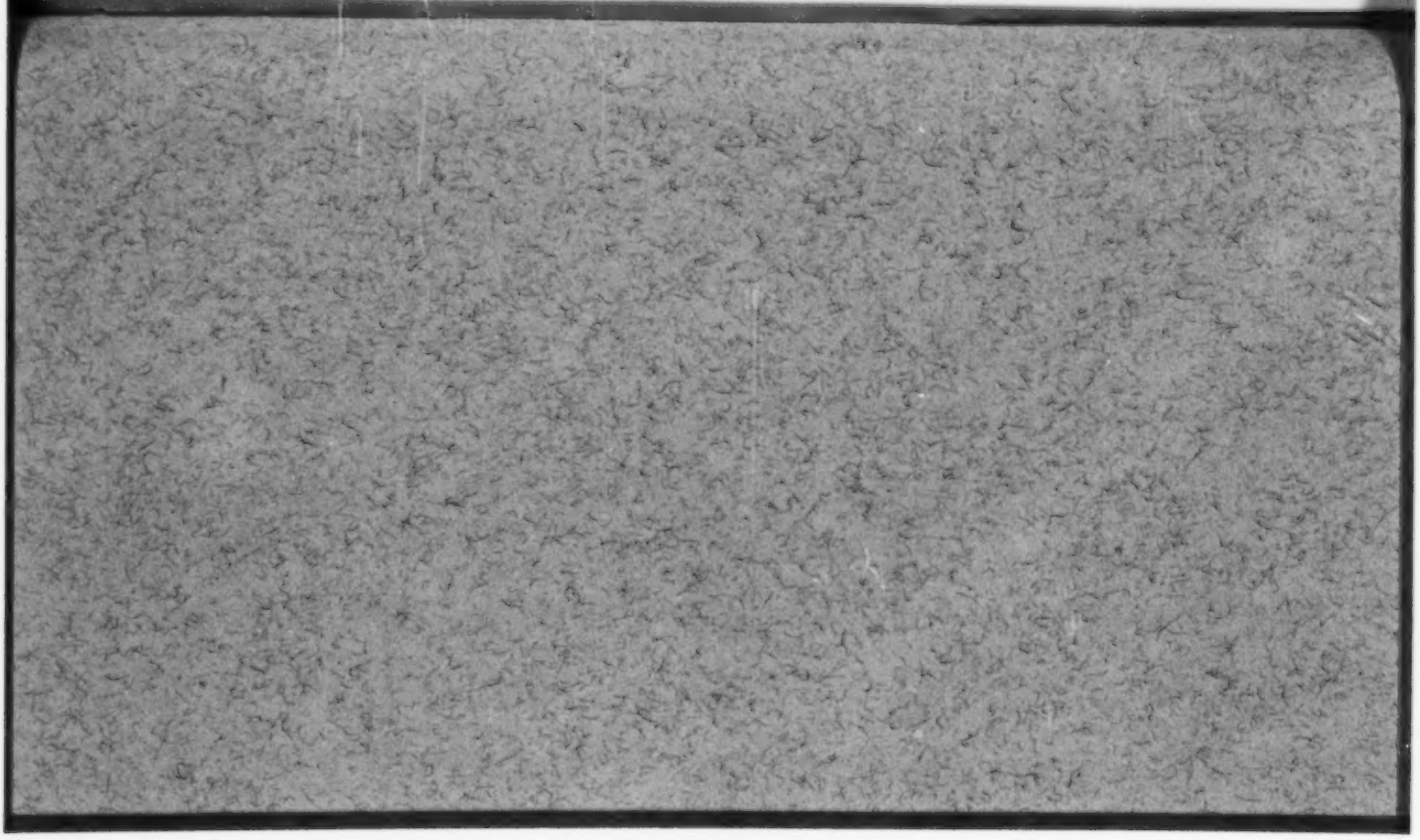
vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO ALIEN PROPERTY CUSTODIAN

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

GEORGE T. GOGGIN,
PIERCE LONERGAN,
Counsel for Appellant.



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IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISION ONE

2nd Civil 17913

IN THE MATTER OF THE ESTATE OF CHRISTIAN F. REIHS, DECEASED

HERMANN WEINMANN,
Petitioner and Appellant,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO ALIEN PROPERTY CUSTODIAN,
Objector and Respondent,

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A CORPORATION,
Executor

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

A statement of the facts and law involved has been made in Appellant's Jurisdiction Statement and are adopted here for purposes of this brief (Jur. St., pp. 4-7).

The statements made by Appellee in support of his Motion to Dismiss or Affirm are untenable. Appellee ig-

nores the errors assigned and the federal questions raised on appeal (Assignment of Errors, Jur. St., pp. 2-3).

Appellee asserts his "understanding" of Appellant's claims (Motion to Dismiss, p. 6). These assertions result in Appellee's conclusion that while international agreements made by the President in exercise of American war power are applicable to the issues on appeal, those issues have been resolved by the factual findings of the state court (Motion to Dismiss, p. 11). Appellee's conclusion is unsupported by any principle of appellate practice and contrary to established law:

> "Where the decision of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise national authority could be frustrated by local rules."
> (*United States* v. *Pink*, 315 U. S. 203, 238.)

No decision of a state court is tenable which arrives at a judgment in violation of principles of national sovereignty and provisions of the federal constitution. Determinations made by avoiding federal questions; or the considerations of such questions in a manner indicating an avoidance, are no less untenable. *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206, and cases cited at p. 213; *Ward* v. *Love*, 253 U. S. 17, 22; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289; *United States* v. *Pink*, 315 U. S. 203, 238. The Motion of Appellee is untenable upon the same authority and for like reasons.

Federal Questions Raised

In assignment of error I, Appellant presented (Jur. St. p. 10-12), and specified error in construing and applying Chapter 1160, Cal. Statutes of 1945 (Probate Code Section

259) to the issues and facts so as to be repugnant to and in violation of at least three provisions of the federal Constitution:

(A) Article II, Section 1, Clause 1, United States Constitution which vests executive power in the President; and grants authority to negotiate with our Allies of World War II, agreements to control extraterritorial legal rights of the inhabitants of occupied Germany, after the surrender; under the facts of this case.

(Principles stated and authorities cited, Jr. St., p. 8.)

(B) Article II, Section 2, Clause 1, United States Constitution, making the President Commander in Chief of the Armed Forces; with authority to establish Military Government in conquered territory. (Principles and authorities—Jur. St., p. 9.)

(C) Article VI, Clause 2, United States Constitution, making the Constitution, and international agreements executed by the President of the United States, under constitutional authority, the Supreme Law, and, obligatory upon every judge. (Jr. St., p. 10; *Hiroto* v. *MacArthur*, 338 U. S. 197, 208; *U. S.* v. *Curtiss-Wright Export Corporation*, 299, U. S. 304, 318-322.)

Assignment of Error I further specifies the California law as applied, is in conflict with designated international agreements entered into by the President in the exercise of American war power against Germany; particularly (Jr. St., p. 9) the California Law is contrary to:

> (1) The provisions of the Declaration of Berlin, paragraphs two and five; and, Article 13 (b) (Jur. St. Append. B. pp. 35, 36).
>
> Pertinent provisions of this declaration state that there is no central government or authority in Germany (2nd paragraph); that the designated allied governments assumed supreme authority with respect to

Germany, including all the powers possessed by the former German government and its subsidiaries (5th paragraph); and that the designated allied governments shall determine the territorial limits and status of Germany (6th paragraph); in Article 13 (b) of this declaration (Append. B, p. 36) it is declared that the allied representatives will impose on Germany "political, administrative, economical, financial, military and other requirements arising from the complete defeat of Germany."

(2) Potsdam—Tripartite Agreement of Berlin (Jur. St., Append. B, p. 37), provides that for the time being no central German government shall be established (9 (IV)) and that the Control Counsel shall take steps to "exercise control and the power of disposition of German owned external assets not already under the control of United Nations which have taken part in the war against Germany." (p. 38).

(3) Allied Representatives Proclamation 2—Agreement Between Allied Governments On Certain Additional Requirements To Be Imposed on Germany (Jur. St., Append. B, p. 38). This agreement (first paragraph) is a supplement and part of the requirements of the Allies imposed under the Declaration of Berlin. Allied Representatives Proclamation 2, declares that the Allied Representatives will regulate all matters affecting Germany's relations with other countries; and, prohibits any foreign obligation or undertaking to be assumed or entered into by German nationals without the sanction of the Allied Representatives (Jur. St. Append. B, p. 38 (III)).

This proclamation states that the Allied Representatives will give directions concerning the abrogation, or bring into force of any treaty, or any part or provision of any treaty, to which Germany had been a party; and, that as of the date of the German surrender, all diplomatic, commercial and other relations of Germany with other nations ceased to exist (Jr. St., Append. B, p. 39).

This proclamation states the Allied Representatives

> will exercise control over *all, or any part or aspect, of German* industry, trade, distribution and *economy generally, internal and external, and over all related or ancillary matters,* including the direction or prohibition of the use and disposal of any public or private buildings, products, materials, stocks or resources. (Append. B, p. 39); and further provides, that the Declaration of Berlin and all the proclamations and instructions issued thereunder should override any provisions in German law inconsistent therewith; and that *in the event of any doubt as to the meaning or interpretation of any term or expression* in the Declaration of Berlin and in any proclamation or instruction issued thereunder, *the decision of the Allied Representatives shall be final* (Jur. St., Append. B., p. 39 (XIII)). (Emphasis supplied.)

Appellee admits the validity of the Declaration and Proclamations in their application to the issues of this case below, and on appeal (Motion to Dismiss, p. 11). The Terms and provisions of these documents are plain and unequivocal. Under Article VI, Cl. 2 of the federal Constitution, they are the supreme law of the State of California, and of the United States. They are obligatory upon every judge.

As international agreements made with our Allies of World War II, they fall within, not only the provisions of Article II, Sect. 1, Cl. 1, which vests executive power in the President, as the sole organ of the United States in the field of foreign relations (*United States* v. *Curtiss-Wright Ex. Corp., supra*); but also, in their application to occupied Germany, after the surrender, are "in furtherance of the common objectives" of American war power against Germany (*Hiroto* v. *MacArthur, et al., supra*); exercised by the President. (Art. II, Sect. 2, Cl. 1), as Commander in Chief of the Armed Forces.

In reply to Appellee's Motion to Dismiss, Appellant will establish in what follows that:

1. Appellee's Motion is stated in terms and legal concepts that are inadequate to determinations of the substantial and grave character of the issues raised on appeal. Appellee's assertions are placed within too narrow a frame of reference to legal matters and principles involving dealings of the United States with foreign nations, and, the exercise of national sovereign powers.

2. The principal authority relied upon by Appellee is distinguishable. In *Clark* v. *Allen*, 331 U. S. 503, the sole constitutional issue raised was under Article I, Section 10. This section is not at issue on appeal. In the *Clark* case (*supra*) the Court expressly found no evidence of executive action terminating international relations with Germany (p. 514). In contrast, the record on appeal here, and international agreements before the Court, evidence the executive decisions, which determine the issues, under the Federal Constitution and principles of our national sovereignty.

3. The essentially political nature of the findings and conclusions of the state court involve determinations of, and attempts to define and limit, the exercise of sovereign powers of the United States, judicially. So constructed and applied the California law is contrary to and in violation of the constitutional provisions and international agreements upon which the appeal is based.

Issues Involve Matters of Grave International Concern

No approach to the issues of this case can properly be made without an understanding that the United States entered newly charted fields of international relations, with our Allies, and cobelligerent Russia, during hostilities in World War II, and, more particularly, as applied to the issues here, in the establishment of an international government for Germany, after the surrender. It should be understood that the enemies of our country and those opposed to

the accomplishment of the objects and purposes for which the war was fought, even before a peace treaty can be agreed upon, accuse this country of violating previously established principles of international law and compacts to which the United States is a party. (*i. e.*, Hague Convention, 1907).

Paraphrasing the language of Justice Jackson: "The issues are truly great ones. They only involve war crimes issues (in this instance rights of inheritance) secondarily, for primarily the decision will establish or deny that this (California) Court has power to review exercise of military powers abroad and the President's conduct of external affairs in our government. The answer will influence our nation's reputation for continuity of policy for a long time to come." (Memorandum Opinion, Oct. Term, 1948, 335 U. S. 875, 880).

The involvement of the judgment appealed in these essentially political matters is apparent in the holding that the statutes of the former German government remained in full force and effect and unimpaired, by the establishment of Military Government for Germany, May, 1945 (Jur. St. Append. A, p. 26 (XI); p. 27 (II)).

The California law becomes further involved in American foreign policy when consideration is given to the laws of nations.[1]

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[1] The purpose of this brief makes impractical to more than suggest the nature and form of Military Government For Germany, after the surrender, and its system of international law, and, the American position that the substantive law enforced by the Allied representatives constituted an inherent part of a legal system, international in character. The necessity of establishing the nature and character of government and system of law controlling the alien enemies in this case, seems necessary:

(1) To demonstrate that the issues on this appeal may not be determined at levels of domestic statutory law.

(2) To establish the essentially political nature of the determinations attempted in the judgment appealed.

(3) To establish the gravity of the error attempting to define and limit, judicially, the nature of individual private statutory rights in an essentially international political situation.

In modern times and among civilized nations it is recognized that a nation, as such, is composed of people, territory, and government. It is the argument of authorities recognized by some world powers, and by those inimical to the accomplishment of American policy, after the surrender, that after the destruction of the political government of Germany by conquest, there remained a "residual government," inherently in the inhabitants of the occupied territory; that this government, though unorganized and inoperative, is entitled to and protected by legal principles established and recognized by civilized nations. (*i.e.*, Hague Convention, Rules for the Conduct of War on Land, 1907, Art. 23 (no suspension of the courts); Art. 43 (respect for the laws of the country); Art. 46 (respect for domestic legal rights of private property and personal liberty). (Alstoetter case, pp. 10619, 10758.))

In the accomplishment of the broader purposes for which the war was fought, and to prevent Germany from ever again becoming a threat to the peace of the world, and a danger to the nations of Europe, the Allies agreed after the surrender, upon programs for denazification of the social, political, educational and judicial systems of Germany. The former German Civil Courts were closed. Reparations in kind were extracted. Objects of demilitarization were accomplished. Where justice and equity required, private property was restored retroactively to the year 1933; even where the titles of innocent third parties, validly acquired under German law, were divested retroactively. These programs were administered at all levels of public and private organization, and to persons and property. (Documents relating to the establishment of the Allied Control Authority—Official Gazette of the Control Council for Germany, supplement No. 1; Allied Representatives Proclamation, No. 2, Official Gazette, Control Council, No. 1, p. 8; Law 2, Official Gazette, U. S. Zone, Issue "A",

p. 7; Law 59, Issue "G", p. 1.) Under agreement of the Allies, the people were treated uniformly, insofar as was practical (Jr. St., Append. B, p. 37, III, A, 2).

Without doubt, and it is universally recognized by all acceptable authority, the United States scrupulously observed and complied with all of its international obligations in the conduct of the war against Germany. It is likewise generally accepted, and is evidenced by the international agreements to which the United States is a party, that an international government was established after the surrender, for the government of the occupied territory. ("Legal Status of Germany According to the Declaration of Berlin," Hans Kelsen, American Journal of International Law, 1945; "Germany's Present Status," F. A. Mann, Sueddeutsche Juresten-Zeitung, Volume 2, No. 2, September 1947; Alstoetter case, pp. 10, 615-16; quoting with approval American Journal of International Law, Freeman, July, 1947, p. 605; Fried, April, 1946, p. 327.) The people and territory were subjected to laws and regulations under the laws of nations, and laws, proclamations, directives and instructions of the Four Powers approved or acquiesced in by the United Nations. These became and constituted part of the system of international law governing the inhabitants of the occupied country in their internal and external affairs.[2] (Alstoetter case, p. 10621.)

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[2] The case of *United States* v. *Josef Alstoetter*, decided 3 December, 1947, by American Military Tribunal III, is cited in this brief, though a "criminal case" on indictments alleging "war crimes." It is cited for the following reasons:

1. The tribunal was established by United States Zonal Ordnance, but its authority and character was international (p. 10612).

2. The tribunal members were American Jurists trained in concepts of American constitutional law and to whom considerations and application of ex post facto and retroactive legislation is particularly repugnant in national legislation (p. 10648-49).

3. The decision in the Alstoetter case stated and defined the international nature and character of Military Government For Germany,

The Allied Representatives assumed supreme authority with all the powers of the former German government, over the social, economic, and political affairs of the people, in matters both external and internal, to the occupied territory (Jur. St. Append. B, p. 36).

Under these agreements and established principles of international law, the American concept of vested rights in private property is not necessarily expressed; and is not a principle of the law of nations. Some civilized nations do not accept this principle for all purposes. (Alstoetter case, pp. 10636-37.)

The Attorney General of the United States is of the opinion that vested rights of individuals in private property did not exist in the occupied territory. In an opinion filed in another case involving the same section of the California Probate Code, as in this case, the Attorney General stated:

> "Although retroactive laws are repugnant to the Constitution of the United States, it must be remembered that the issue in this case relates, not to Ameri-

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after the surrender, and its international system of law governing private persons and property (pp. 10614-10630).

4. The case is authority for the American position that Military Government For Germany, after the surrender, differs from the type of occupation when in the course of actual warfare an invading army enters and occupies the territory of another state. The case establishes the American doctrine that the Allied Powers were not subject to the limitations of the Hague Convention, in the occupation of Germany after the surrender (pp. 10614-15).

5. Its official interpretation and approval by quotation and citation of texts and statements of international authorities, which are the basis for appellant's assertions as to the nature and character of the government of Germany after the surrender, and the international issues which the judgment appealed would involve, if not reversed (pp. 10615-18).

Citations are to the pages of the official mimeographed copy of the decision, lodged in major public libraries in the United States, in the absence of any printed report of the case.

> can law, but to German law. In its supreme sovereign capacity the occupying authorities in Germany, through its Allied Control Council, is unrestricted in the laws it may enact. Retroactive laws in Germany today are valid. . . .
>
> "It is equally idle to speak of vested rights in connection with rights of inheritance as they existed in Germany on any date during the war." (Opinion filed in Estate of Marie V. Peters, Los Angeles County, Case No. 233,316, Vesting Order, September, 1946.)

From the foregoing considerations, it may appear that the judgment appealed is inextricably involved in determinations of international principles and agreements governing Germany, as of November 1946.

The judgment holds that under the law, as it existed in November, 1946, there existed rights of inheritance reciprocal to the statutory rights guaranteed under California law; and that, under the California law, there "passed to and vested in" designated alien enemies, the right to specific personal property in California. The judgment further holds that the former German laws of succession and inheritance remained in full force and effect, unimpaired, in their German constitutional guarantees (Jur. St. Append. A, p. 26 (XI); p. 27 (II), III)).

Such determinations do violence to the legal principles subscribed by the President in the establishment of an international government for the occupied territory, and the determination of the Allies that no German government existed after the surrender, with the necessary legal consequence that no German constitutional law remained.

Appellee's Motion to Dismiss discusses in its entirety matters appertaining to the exercise of control of individual private rights under military government for Germany. Considerations of administrative control do not encompass

the legal concepts necessary to determination of the issues on appeal. The substantial nature of the Federal questions raised by Appellant under Article II, Sect. 1, Cl. 1; Art. II, Sect. 2, Cl. 1; and Art. VI, Cl. 2, are not considered in Appellee's motion. In this respect, Appellant's jurisdictional statement remains unchallenged.

Clark v. *Allen*, 331 U. S. 503. Distinguished.

The case of *Clark* v. *Allen (supra)* was decided by this Court, in proceedings on writ of certiorari to the Ninth Circuit Court of Appeals, October Term, 1947.

In these proceedings the petitioner attacked the constitutionality of Section 259 of the California Court as a violation of Article I, Section 10, Federal Constitution, upon the grounds that the California law was an intrusion upon the forbidden entry into foreign relations and the making of treaties or compacts with foreign countries.

The California law originally enacted in 1941 was subsequently amended in 1945, in particulars not material to the constitutional issue involved in the *Clark* (*supra*) case, or on this appeal. The amendments consisted principally in the shifting of the burden of proof, and elimination from earlier law of the requirement that American citizens should have the right of payment of the proceeds of the foreign estate to them in the United States.

In California the legal fiction exists that title to property vests in heirs or beneficiaries, under the probate law, as of the date of death of decedent. The date of death of decedent in the *Clark* case (*supra*) was November, 1942. The effective date of the Supreme Court decision therefor was the year 1942. At this date the war against Germany was in progress. Germany had not surrendered; the Declaration of Berlin, the Potsdam Agreement and the Allied Agreement for Additional Requirements to be Imposed on Germany had not been made; and no international government

for Germany ruled the inhabitants of Germany under these agreements.

The only constitutional issue raised in the *Clark* case (*supra*) was under Art. I, Sec. 10, and the provisions of this section which prohibits states of the United States from entering into agreements, treaties or compacts with foreign nations. No issue is raised in this appeal under Art. I, Sect. 10.

The decision of the court expressly states:

> "We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war, or the obligations of either party in respect to them." (P. 514).

And the Court concluded there was no invasion by the State of California of the international field as prohibited by Article I, Section 10.

It is respectfully submitted that in the instant case there is in evidence in this case, and part of the record on appeal (Jur. St. Append. B, pp. 1-8), the agreements which determine the nonexistence of the German government and the establishment of an international form of government for Germany, after the surrender. These agreements speak for themselves in plain and unequivocal terms. The validity of these agreements and their application to the facts and issues of this case, below, and on appeal, is admitted by the Appellee.

It does not appear in the *Clark* case (*supra*) that any of the constitutional issues raised in this appeal, were considered.

It is respectfully submitted that the authority of *Clark* v. *Allen* (*supra*) in its application to Section 259 of the California Probate Code, is limited to the record of that case, on certiorari, and, to the section of the Constitution considered.

Federal Questions Are Substantial

Assignment of Error I

Appellant's Assignment of Error I (Jur. St. pp. 10-12) assigns as error the State Court's construction and application of the California law (Chap. 1160, Laws of 1945). Construed and applied, as in the judgment appealed, the act grants to the alien enemies in this case constitutionally guaranteed, vested rights to personal property in California, contrary to and in violation of the international agreements of the President made by him in the exercise of American war power against Germany; and in violation of Article II, Sect. 1, Cl. 1, Federal Constitution, vesting executive power in the President; Art. II, Sect. 2, Cl. 1, making the President Commander in Chief of the Armed Forces; and, Art. VI, Cl. 2.

It is admitted, and otherwise established in this case, that by the terms of these agreements the President in the exercise of American war power, established along with the Allies, an international government for Germany, after the surrender; and that the system of law by which the inhabitants of the occupied territory were governed (including the aliens in this case) was a legal system without constitutional guarantees (in the general legal acceptation of the term), and with no guarantees of individual legal rights by a national government; and no such sanctions other than the uniform application of principles of equity and justice, recognized under the law of nations, in administration of programs for accomplishment of objects and purposes for which the international government was established. Under such a system of law, the concept of vested rights to private property, and the denial to the established government of authority to validly and retroactively divest individual titles to private property is not recognized (*Alstoetter* case; Opinion of Attorney General in *Peters* case).

The plain and unequivocal terms of the international agreements state that the Allied Representatives assumed supreme authority under this system of law; and declared that it extend to all social, economic, and political matters, directly or indirectly affecting the affairs of the inhabitants, and in all related matters, both external and internal, to the occupied territory. (See pp. 3-5, *supra.*)

It is submitted, that the California constitutionally guaranteed rights granted, under Section 259 of the California Probate Code, construed and applied to the alien enemies in this case, is a grant of legal rights contrary to the policy of the President as expressed in the agreements for the government of these aliens.

By the expressed terms of these agreements, all German law inconsistent with the Declaration of Berlin, or contrary to proclamations, directives, or instructions, of the Allied Representatives, were repealed. (Agreement on Additional Requirements, Jur. St., Append. B, p. 39, Sect. XI).

This agreement, Allied Representatives Proclamation 2, further provided that in the event of doubt as to the meaning or interpretation of any term or provision of the Declaration of Berlin, or any proclamation under it, the decision of the Allied Representatives was final. (Id., Sect. XIII)

Aside from the principle of law that these agreements are not subject to judicial review (Opinion of Justice Douglas—*Hiroto* v. *MacArthur*, 338 U. S. 197, 208; Memorandum Opinion Justice Jackson, Oct. Term, 1948, 335 U. S. 875), the agreement (Additional Requirements Imposed) expressly states that the decision of the Allied Representatives shall be final in any interpretation of the Declaration and other agreements and proclamations. This provision, as well as the whole body of principles established by the agreements, is the supreme law of California. (Article VI, Cl. 2, Federal Constitution) (*U. S.* v. *Belmont*, 301 U. S. 324, 331.)

Whether in the accomplishment of the objects for which the war was fought, it will serve the purpose of the Allied Representatives to recognize rights of these alien enemies to property in California or elsewhere, is a political matter, not for judicial determination by an American Court.

No state can rewrite the federal foreign policy to conform to its own domestic policies. As to such purposes, the State of California does not exist legislatively or judicially. In all negotiations and dealings of the United States with foreign nations, the United States speaks with one voice and acts as one; State lines disappear.

United States v. *Pink*, 315 U. S. 203, 233;
United States v. *Belmont*, 301 U. S. 324, 331-332.

ASSIGNMENT OF ERROR II

In his first assignment of error Appellant has stressed the legal fact that the judgment appealed, in attempting to apply California statutory law, has invoked the legislative power of the state in a manner contrary to, and in conflict with federal constitutional provisions and international agreements relied upon in this appeal.

By his assignment of error II, the Appellant attacks the authority of the state judiciary to enter the judgment appealed contrary to Article VI, Cl. 2, providing that the federal constitution and agreements made by the President, under his constitutional authority, are the supreme law and obligatory upon every judge.

The principles of national sovereignty and the provisions of the federal constitution which deny to the legislative branch of states of the United States, power and authority to exercise the exclusive prerogatives of national sovereignty, apply with equal force to denial to the judiciary the right to review the discretion of the executive in exercise of his exclusive powers of national sovereignty. Article VI, Cl. 2 is mandatory and self-executing.

The terms and provisions of the international agreements by which the President joined with our Allies, in the establishment of an international government for Germany, are clear and unequivocal. They provide that the Allied Representatives have the supreme authority in the carrying out of the programs which shall prevent Germany from ever again becoming a threat to the peace of the world, and a threat to her neighbors (*supra*, p. 8). These programs were carried out at all levels of society; public institutions, and private persons, and to public and individual property. In so doing, the Allied Representatives' decisions were final, in matters both internal and external to the occupied territory. (Supra p. 4(1)). The agreements override all provisions of German law inconsistent therewith (Jur. St. Ap. B, p. 8, Sect. XI). By Article VI, Cl. 2, the federal constitution makes these agreements obligatory upon every judge.

The agreements made by the President with our Allies in World War II "fall as clearly in the realm of political decisions as all other aspects of military alliances in furtherance of the common objectives of victory," and "when the President moves to make arrangement with other nations—he acts in a political role on a military matter. His discretion cannot be reviewed by the judiciary." (*Hiroto* v. *MacArthur*, 338, U. S. 197, 208).

The judgment appealed was the result of submitting these agreements to trial processes, and upon the testimony of private persons, determining the application of the international agreements to former German statutory law; and by judicial procedure, interpreting the agreements so as to deny to them the effect of supreme law in California. Under assignment of error II, Appellant submits that no such discretion exists in the judiciary. The jurisdiction to define the international agreements is the power to limit them. The rule applies to all international compacts and

agreements, "from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." (*United States* v. *Belmont*, 301 U. S. 324, 331; citing *United States* v. *Curtiss-Wright Ex. Corp.*)

Appellee's motion to dismiss or affirm makes no reference to Appellant's Assignment of Error II and the issue raised (Jur. St., pp. 2, 3, B), that the judgment appealed does violence to Article VI, Cl. 2, federal constitution. The assignment deals particularly with the Clause 2, which makes international agreements of the President, under his constitutional authority, obligatory upon every judge. The involvement of international political determinations in the judgment is apparent from consideration of matters presented under assignment of error I and the federal question raised (Jur. St. p. 2-4); particularly in holding that the former German statutes remained in full force and effect and unimpaired in November, 1946; nearly eighteen months after the President declared no German government existed (Declaration of Berlin, June, 1945).

It was agreed by the President that after the surrender not only that "no German government" existed, but also that "no central government" would be established until the objectives of the war were attainable (Potsdam Agree. 9(IV)). An international government was established to apply to the peoples and territory occupied (including their extraterritorial legal rights), principles of international law.

It is determined in the judgment appealed that these agreements and the government established by them did not "impair" the former German statutory laws of inheritance, guaranteed by the former German constitution. (See

"resume" of evidence, Opinion District Appellate Court, Jur. St. Append. A, p. 19.) It would be difficult to assume a more flagrant invasion by the judiciary of the exclusively political functions of national sovereignty.

The judgment further holds that under the California law there "passed to and vested in" these aliens a right guaranteed by the California constitution to property in California. The Allied Representatives governed these aliens, both in their domestic and extraterritorial affairs, under a system of law which does not recognize vested rights. Whether it will serve the purposes of the President in the exercise of American war power, to agree with our Allies, that extraterritorial rights may vest in the inhabitants of the occupied territory is a political matter.

And when, as in the appealed judgment, the State Court determines that such rights do vest as of a definite date, November, 1946, the judgment not only attempts to limit the discretion and authority of the President, but is contrary to the expressed provisions of the international agreements which state that the Allied Representatives shall control the extraterritorial rights of the inhabitants; and, that in the interpretation of the agreements the decision of the Allied Representatives shall be final (Id. p. 8, Sect. XIII).

The judgment seems to demonstrate the need for the rule that the powers of the President exercised, under his constitutional authority, shall not be subject to judicial review.

> "When the President moves to make arrangements with other nations—he acts in a political role on a military matter. His discretion cannot be reviewed by the judiciary." (*Hiroto* v. *MacArthur, supra.*)

The judgment involves substantial federal issues not only repugnant to federal constitutional provisions cited on appeal but also to the exercise of federal sovereign power

inherent in national sovereignty (*U. S.* v. *Curtiss-Wright Ex. Corp.* (*supra*)). As it now stands the judgment based on "amply sufficient evidence" holds that the statutory civil rights of the inhabitants of the occupied territory remained in full force and effect, "unimpaired" in the guarantees of the German constitution. A concept of legal rights declared in the judgment as "reciprocal" to rights under the California law (Jur. St. Ap. A, p. 27, III).

So stated the judgment is "amply sufficient evidence," that important state judisdictions and courts do not subscribe to the American doctrine as to government and law existing in Germany under Military Government, after the surrender. To state the fact is to state substantial error, and basis for granting this appeal.

In the newly charted fields of international relations upon which the United States has entered, the international issues regarding Germany, after the surrender, "are truly great ones." The final determination of this case on appeal will establish or deny that the Courts of California have the power to review exercise of military powers abroad and the President's conduct of external affairs in our government. The answer will influence our nation's reputation for continuity of policy for a long time to come. (Memo. Opin. Justice Jackson, supra; *Hiroto* v. *MacArthur* (*supra*); *Alstoetter* case, *supra; United States* v. *Pink; United States* v. *Belmont* (*supra*).

Additional Federal Questions

Rather than rely upon the rule that this Court may notice grave errors other than those assigned on appeal, Appellant has assigned and raised substantial federal questions, in addition to those above presented, namely, Assignment of Errors III, IV and V (Jur. St., p. 3). These additional errors relate to violations of the same articles

and sections of the federal constitution, and were made in the judgment appealed, contrary to the international agreements made part of the record. Appellant desires to reserve presentation of these additionally assigned errors pending determination by this Court of Appellee's motion to dismiss or affirm.

Conclusion

The opinion of the State Court (Jur. St., p. 13), and Appellee's motion to dismiss, cite decisions of the Courts of California which disclose, in regard to the application of Section 259 of the California Probate Code to the inhabitants of former German territory, that there has developed in California, since the year 1941 and the declaration of war, a legal situation analogous to that which existed for nearly a decade in the State of New York, in regard to funds in that state, nationalized by the Soviet Government; which funds were later made the subject of the so-called Litvinov letters.

As pointed out by this Court in *United States* v. *Belmont* (*supra*) and *United States* v. *Pink* (*supra*), the "fantastic results" and "dialetic quagmires" which the New York Courts developed, arose from attempts to settle rights of individuals, inextricably involved in United States foreign affairs, by the application of domestic statutory rights, and concepts of law, inadequate for determinations of such matters. A similar legal situation exists in the instant case, and in the California cases relied upon in the decision appealed (*i. e.* Estate of Schluttig, 36 Cal., 2nd, p. 416 (224 P., 2nd, 295).

It is respectfully submitted that the issues raised on appeal present sustantial federal questions of grave importance and public concern. Proper recognition of the legal concepts and distinctions in the American dual system of federal and state government has not been made in this

case. Recognition of the authority of national sovereignty in our foreign affairs, in contrast to the legislative and judicial authority of the state, in domestic matters, is essential to determination of the issues on appeal. An inspection of the record and judgment appealed discloses that no consideration was given to these principles. The State Court attempted, in the exercise of a discretion it did not have, to determine the rights of individuals in terms and concepts of domestic state statutory law, inadequate for such determinations, under the facts.

Oblivious to the differences in state and national sovereignty, the State Court did not consider the authority of the executive branch of the national government, in international affairs and foreign wars. These federal issues were timely raised and assigned as error, on appeal. No mention of such issues is made in Appellee's motion to dismiss or affirm.

It is respectfully submitted that the motion of the Appellee to dismiss or affirm should be denied; the prayer of Appellant granted, and, the judgment of the State Court reversed.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 205

HERMANN WEINMANN,

Appellant,

vs.

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to Alien Property Custodian,

Appellee,

Appeal From the District Court of Appeal of the State of California, Second Appellate District.

Petition for Rehearing and Consideration of the Record on Certiorari.

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